IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2167 of 2005

For Approval and Signature:

HON'BLE MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GAUTAM PUNJABHAI PALKHIWALA

Versus

ANILKUMAR PUNJABHAI PALKHIWALA & OTHERS

Appearance:

1. Special Civil Application No. 2167 of 2005

MR DAKSHESH MEHTA for the Petitioner
MR TS NANAVATI for Respondent No. 1
Respondents Nos. 2-5,9-15,17,18 SERVED
RULE NOT RECD BACK for Respondents Nos. 6-7
MR MIHIR THAKORE, SR.ADVOCATE with MS MINI NAIR for Respondent No. 8
Respondent No. 16 UNSERVED

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date of decision: 25/04/2005

ORAL JUDGEMENT

Heard the learned advocates.

At the request of the learned advocate Mr.Dakshesh Mehta the respondent No.16 is ordered to be deleted.

This Special Civil Application under Article 227 of the Constitution of India has been preferred by the defendant No.5 in Civil Suit No.4380/1982 against the order dated 3rd December, 2004 made by the learned City Civil Judge, Ahmedabad below application Exh.360.

The above referred Civil Suit No.4380/1982 has been instituted by the respondents Nos.1 and 2 herein challenging the various transfers effected and the documents executed by the deceased Punjabhai, the father of the plaintiff No.1 and defendants Nos.1,2,5,8 and 11. Pending the said suit, on 25th February, 1991 the defendant No.5, the present petitioner No.1 produced certified copy of seven documents and prayed for exhibiting the said documents. The documents produced by the defendant No.5 are the Wills allegedly executed by the deceased Punjabhai during his life time at various points of time. The plaintiffs made endorsement over the said application that the plaintiffs shall have no objection if the said documents were exhibited. Accordingly, the said documents were exhibited. Feeling aggrieved, the plaintiffs lodged objection Exh.360 and prayed that the said documents were not proved in accordance with law and the same be de-exhibited. By impugned order the said application Exh.360 has been allowed. The learned City Civil Judge has held that the said seven documents being Wills allegedly executed by the deceased Punjabhai; they were required to be proved in accordance with the provisions contained in Section 63 of the Indian Succession Act, 1925 (hereinafter referred to as "the Succession Act") read with Section 68 of the Indian Evidence Act, 1872 (hereinafter referred to as "the Evidence Act"). As the said documents were not proved in accordance with law they were required to be de-exhibited. Therefore, the present writ petition.

Mr.Mehta has submitted that the Wills in question are in possession of the plaintiffs. As the plaintiffs have failed to produce the original Wills on record, the defendant No.5 was constrained to produce certified copies of the said Wills. The said Wills were duly

registered. The certified copies of the same are, therefore, admissible in evidence as proof of the contents of the said documents as envisaged by Section 77 of the Evidence Act. He has also submitted that the documents which were produced as far back as on 25th February, 1991 were referred to during the examination of the plaintiff No.1 and the plaintiff No.1 having admitted the said documents in his evidence, has now at this belated stage objected to the said documents being received in evidence. The documents once received in evidence ought not to have been de-exhibited. In support thereof, he has relied upon the judgments in the matters of Javer Chand and others v/s. Pukhraj Surana [AIR 1961 SC 1655] and of P.C.Purushothama Reddiar v/s. S.Perumal [AIR 1972 SC 608].

Mr.Thakore has contested the petition. He has submitted that Section 63 of the Succession Act read with Section 68 of the Evidence Act sets out a specific mode for proof of a Will and the Will can be proved in no other manner. In the present case, the documents in question were exhibited for asking without their being proved in accordance with law. They were rightly de-exhibited by the impugned order. He has also submitted that the said documents were exhibited on 20th October, 2004 at Exhibits 338 to 343 and within days thereof the plaintiff had moved the above referred application Exh.360. In support of his argument he has relied upon the judgments of the Hon'ble Supreme Court in the matters of H.Venkatachala Iyengar v/s. B.N.Thimmajamma and others [AIR 1959 SC 443] and of N.Kamalam (Dead) and another v/s. Ayyasamy and another [(2001)7 SCC 503].

Mr.Nanavati also has contested the petition. He has relied upon the judgment of this Court in the matter of State of Gujarat v/s. Gaurang Mathurbhai Leuva [1999(2) GLH 564] and has submitted that if a document is wrongly received in evidence, on application made by a party it should be de-exhibited. He has relied upon the judgments of the Hon'ble Supreme Court in the matters of Bhagat Ram and another v/s. Suresh and others [AIR 2004 SC 436] and of Janki Narayan Bhoir v/s. Narayan Namdeo Kadam [(2003)2 SCC 91].

It should be noted that the Civil Suit has been instituted in the year 1982. After more than 23 years it is still pending before the trial Court. I am informed that at the moment oral evidence of the plaintiff No.1 is being recorded. At this stage of the proceeding I do not propose to entertain this petition and to interfere with

the trial. The petition is accordingly disposed of. Rule is discharged. Interim relief is vacated. The parties shall bear their own cost.

It is clarified that this order shall not preclude the defendant No.5 or any other party to the suit from proving the aforesaid documents in accordance with law. In the event of the decree being passed in the suit against the defendant No.5, the defendant No.5 shall be at liberty to challenge the impugned order made below application Exh.360 in the substantive appeal, if any.

(Ms. R.M.Doshit, J.)

/sakkaf